EXAMINATION UNDER OATH

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FOR PRESENTATION TO

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FRAUD CONFERENCE

2012

COMMONS CENTER

ON THE J.J. PICKLE RESEARCH CAMPUS

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EXAMINATION UNDER OATH

The Examination Under Oath ("EUO") is a very valuable and helpful tool available to insurance companies in dealing with first party claims, particularly fires and thefts. These are the claims that we most commonly see in the fraud category and that provide the insured the most opportunity to either completely fabricate their claim or take a legitimate claim and expand it with the fraudulent addition of unincurred damages.

When to conduct the EUO is a very important consideration in the claim process. An EUO conducted prematurely will not reap the benefit of one taken at a point in time when the primary issues have been developed and, at least, the initial investigation has been conducted so that a more thorough and beneficial EUO can be obtained.

Those who work in first party claims are familiar with the Prompt Payment of Claims statute and the deadlines provided under that statute found in Section 542.051 of the Texas Insurance Code under the general heading of Unfair Methods of Competition and Unfair or Deceptive Acts or Practices. Within those responsive and investigative deadlines, you must be proactive in requesting the EUO so as not to provide the insured an opportunity to say that the request was untimely made or that the process has been waived by an untimely request.

Certainly an effective EUO must take place after there has been an adequate opportunity to investigate and evaluate a first party claim. Obtaining all the available information is invaluable to developing facts which could be further explored in the EUO.

- Fire and Police Reports should be obtained.
- Interviews of witnesses should be completed.
- Damage estimates and inventory should be obtained, if appropriate.
- Receipt and purchase information should be obtained and verified where possible.
- In fire losses, "cause and origin" experts should be engaged.
- Reports to the Index Bureaus should be processed and a past claim history developed on the insured.

Detailed photographs of the loss scene should be preserved and the aspects of the loss which are suspicious or unanswered should be highlighted for the Examiner to pursue. Documenting the scene with photographic and video evidence can often times be invaluable, particularly following a fire loss where the insured is claiming inventory items, placing them in an area where there is clearly no remnant or evidence of the existence of that item.

EXAMNIATION UNDER OATH

The Basis for the EUO

Virtually all insurance policies contain a provision which permits the carrier to take an EUO of the insured with regard to a first party claim. The purpose of an EUO is to allow the carrier to fully investigate a first party claim, to answer unresolved questions, and to pursue elements of fraud which might be presented under the claim. An EUO permits a carrier to assess the veracity and reliability of the insured and to inquire into issues regarding the claim with the insured under oath. The provisions of the policies generally allow for the carrier to question the insured about any aspect of the claim and the policy at issue.

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Typically, the provision is contained within the "Duties After a Loss" section of the policy. The Commercial Property ISO form contains the following language:

> 3) Duties in the Event of Loss or Damage
>
> b We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including the insured's books and records. In the event of an examination, an insured's answers must be signed.

A typical Standard Fire Policy includes similar language to the commercial policy:

What You Must Do After A Loss

In the event of a loss to any property that may be covered by this policy, you must:

f) as often as we reasonably require:

2) at our request, submit to examinations under oath, separately and apart from any other person defined as you or insured person and sign a transcript of the same.

A Texas Homeowner's Form "B" also has similar language:

Duties After Loss. In case of a loss to covered property caused by a peril insured against, you must:

(5) as often as we reasonably require:

(a).....
(b)....
(c) submit to examination under oath and sign and swear to it.

The EUO is a "condition precedent" to payment of the claim. *See State Farm General Ins. Co. v. Lawlis,* 773 S.W.2d 948 (Tex. App.—Beaumont 1989, orig. proceeding). Texas courts have recognized that "[p]olicy terms requiring a policyholder to submit to an EXAMINATION UNDER OATH before filing suit are valid." *In re Foremost County Mut. Ins. Co.,* 172 S.W.3d 128, 132 (Tex. App.—Beaumont 2005). If an insured fails to submit to an EUO and instead files a lawsuit on the contract of insurance, courts will abate the matter until such time as the insured complies with the condition precedent. *See In re Foremost County Mut. Ins. Co.,* 172 S.W.3d 128 (Tex. App.—Beaumont 2005, orig. proceeding); *Lidawi v. Progressive County Mut.,* 112 S.W.3d 725 (Tex. App.—Houston [14th Dist] 2003, no pet.). At that point in time, the examination takes on the appearance of a deposition but without the rules and restrictions governing same.

Who has to Submit to an EUO

Any "insured" under the policy terms may be required to provide an EUO.

Norris v. Fire Ins. Exchange, No. 09-97-034 CV, 1998 Tex. App. LEXIS 7229 (Tex. App.—Beaumont 1998, no pet.). The failure of such an insured to appear for an EUO is evidence of a breach of duty under the contract. Additional insureds, particularly family members living at the insured location, may be subjected to an EUO. An EUO can be required of at least the named insured(s). *West v. State Farm Fire and Cas. Co.,* 868 F.2d 348, 349 (9th Cir. 1989). Substitutes for the insured(s) will not work even if a proper or legal delegation has been made. *Sims v. Union Assur. Society,* 129 F. 804 (C.C. Ga. 1903) (bankruptcy receiver); *Hartford Fire Ins. Co. v. Palace Cafe,* 305 U.S. 634 (1938) (public adjuster hired by insured). If the policy permits more than one EUO, multiple exams may be permitted.

What if the Insured Fails to Submit to an EUO

The cases in Texas, and in other jurisdictions, are split regarding the effect of failure to submit to an EUO. *Couch on Insurance*, sec. 196.29 (Jan. 2003). Some Texas courts hold that the failure to sign and return and EUO is a material breach of the contract and will bar the insured from suing the carrier on the contract. *Perrotta v. Farmers Ins. Exchange,* 47 S.W.3d 569, 574 (Tex. App.—Houston [1st Dist.] 2001). There is an older line of authority, however, suggesting that abatement is the only remedy for the failure to comply with the EUO requirements. This line of authority likely did not involve a policy provision making the breach of a condition a material breach justifying denial, as do the current policies. *See, e.g., Lawlis,* 773 S.W.2d at 948 (*discussing Humphrey v. National Fire Ins. Co.,* 231 S.W. 750 (Tex. Comm'n App. 1921, judgt. adopted)).

More recently, two federal courts have held that abatement rather than dismissal of an action is appropriate when the insured fails to comply and submit to an EUO. *See Rossco Holdings, Inc. v. Lexington Ins. Co.*, NO. H-09-cv-04047, 2011 U.S. Dist. LEXIS 39011 at *4 (S.D. Tex. Apr. 11, 2011) (holding Lexington Insurance was entitled to an abatement of the action rather than dismissal where insured failed to submit to an EUO); *U.S. Pecan Trading Co., Ltd. V. General Ins. Co. of America,* EP-08-CV-347-DB, 2008 U.S. Dist. LEXIS 104563 *2 (W.D. Tex. Nov. 6, 2008)

(holding insured was entitled to a copy of his prior statement before the EUO was taken but abating the case until there had been compliance with the condition of coverage).

How to Require an EUO

A formal demand in writing should be made by the carrier or its representatives. *Leitner & Simpson, Law & Practice of Insurance Coverage, sec. 3.5 (2002).* The specific language of the policy should be referenced. *Id.* The demand should be for a reasonable time and location. *Id.* The county where the loss occurred or the insured resides is usually best. *Id.* Some courts have held that delay in the investigation and resolution of the claim can result in loss of the right to insist on an EUO. *Id.*. The EUO may be requested at any time and is not waived if not requested in the first 60 days. See Poteet v. Kaiser, *No. 2-06-397-CV, 2007 Tex. App. LEXIS 9749* (Tex. App.—Fort Worth December 13, 2007, pet. denied); In re Foremost County Mut. Ins. Co., 172 S.W.3d 128, 132 (Tex. App.—Beaumont 2005, orig. proceeding) (holding that an insurance company did not waive its right to an EUO by requesting it more than fifteen days from the initial claim). The policies in Texas generally do not set forth a time period during which an EUO must be requested.

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February 7, 2012

C.M.R.R.R.

Mr. John Doe
1234 Acme Lane
Dallas, TX 75201

Dear Mr. Doe:

Please be advised that our firm represents World Wide Insurance Company. Your recent fire claim has been referred to us with a request that we assist our client in properly responding to your claim.

Your policy of insurance requires, generally, that you cooperate with the insurer as they investigate your claim or loss, and that (if requested) you submit to an

Examination Under Oath in regard to the facts surrounding your claim. Nothing about this letter is intended to suggest that the insurance company is rejecting or denying the claim in question. However, my client does reserve the right to deny coverage to you, and anyone claiming coverage or benefits under the subject policy, based on information learned during the course of their investigation. None of the acts undertaken by the insurance company, or any agent, representative, or law firm, should be construed as a waiver of any policy defense available to the insurance company. The insurance company specifically reserves the right to investigate the claim which you have presented without waiving any of the rights it may have under the policy, whether set forth in the policy, in this letter, or at law.

Pursuant to the terms and conditions of the reservation of rights set forth herein, we would like to take your statements in our office on **Friday, March 16, 2012, at 9:00 a.m.** Our office is located at 4849 Greenville Ave., Suite 1300, Dallas, TX 75206. Upon receipt of this correspondence please call and confirm if this date and time is convenient for you and advise me if you will appear to complete this requirement as set forth in your policy at that time.

In connection with this sworn examination, it would be appreciated if you would make an effort in advance to gather the following documents, and any others which you feel might be helpful to my clients in evaluating your claim:

Please bring with you all of the following documents at the time of the examination:

(1) a copy of the insurance policy in question;

(2) any and all inventories or similar lists, whether formal or informal, whether final or in draft form, showing, summarizing, or relating to any of the items involved in your claim;

(3) any and all receipts, canceled checks, warranty booklets, manuals, or other similar documents which might substantiate proof or ownership of any item claimed in your loss, or which might provide information regarding model or serial numbers for any such items;

(4) any and all photographs, videotapes, or other visual depictions of any of the items involved in your claim, whether taken or made near the time of your loss, or at any time previous;

(5) any and all written and/or recorded communications taking place between you and the insurance company, and having anything to do with the claim in question;

(6) all documents showing, reflecting or relating to any claim you have previously made under any policy of insurance, relating to theft,

destruction, or other loss of real or personal property;

(7) copies of any and all paycheck stubs or other documents reflecting any income received by you in the last two years;

(8) copies of any and all itemized monthly statements for any credit card accounts for the last two years, including those relating to any business of yours;

(9) copies of any and all itemized monthly statements from any bank account for the last two years;

(10) copies of any and all documents reflecting or relating to any debt owed by you or any business of yours and your spouse's;

(11) any and all copies documents relating to any bankruptcy filed by you or any business of yours or your spouse's;

(12) any and all copies of pleadings regarding any lawsuit that may have been filed including any business or divorce;

(13) any and all copies of demand letters regarding any past due debt received by you or any business of yours or your spouse's in the last two years;

(14) the original receipts, cancelled checks, credit card statements, or any other documents reflecting any amounts spent by you or any business of yours or your spouse's regarding the purchase and/or ownership of any of the property involved in this matter;

(15) any and all copies of cancelled checks written by you for the months of November 2011, December 2011 and January 2012;

(16) any and all documents reflecting the payment history on any mortgage or lease of yours or any business of yours for the past five years;

(17) any and all copies of any documents reflecting the payment history on any car loan or auto lease of yours or any business of yours;

(18) any and all copies of any document or policy concerning any insurance secured on any dwelling in the past four years;

(19) any and all copies of documents concerning persons with financial or insurable interest in the dwelling and personal property at issue;

(20) any and all Fire Marshall's or Police Department reports relative to the loss in question;

(21) any and all contractors' estimates of repair;

(22) any other information which would substantiate or support the cost of repair for the damage done to the dwelling involved in the above-referenced fire loss;

I await your confirmation of this appointment.

Yours very truly,

Marc H. Fanning

MHF:alf.

cc:
Court Reporter

bcc:
Company

Sec. 542.004. EXAMINATION OF TAX RETURNS PROHIBITED:

(a) An insurer regulated under this code may not require a claimant, as a condition of settling a claim, to produce the claimant's federal income tax returns for examination or investigation by the insurer unless:

. . .

(1) the claimant is ordered to produce the tax returns by a court; or

(2) the claim involves:

(A) a fire loss; or

(B) a loss of profits or income.

(b) An insurer that violate this section commits:

(1) a prohibited practice under this subchapter; and

(2) a deceptive trade practice under Subchapter E, Chapter 17, Business & Commerce Code.

(c) A claimant affected by a violation of this section is entitled to remedies under Subchapter E, Chapter 17, Business & Commerce Code.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.055. RECEIPT OF NOTICE OF CLAIM:

(a) Not later than the 15th day or, if the insurer is an eligible surplus lines insurer, the 30th business day after the date an insurer receives notice of a claim, the insurer shall:

(1) acknowledge receipt of the claim;

(2) commence any investigation of the claim; and

(3) request from the claimant all items, statements, and forms that the insurer reasonably believes, at that time, will be required from the claimant.

(b) An insurer may make additional requests for information if during the investigation of the claim the additional requests are necessary.

(c) If the acknowledgement of receipt of a claim is not made in writing, the insurer shall make a record of the date, manner, and content of the acknowledgment.

Sec. 542.056. NOTICE OF ACCEPTANCE OR REJECTION OF CLAIM:

(a) Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss.

(b) If an insurer has a reasonable basis to believe that a loss resulted from arson, the insurer shall notify the claimant in writing of the acceptance or rejection of the claim not later than the 30th day after the date the insurer receives all items, statement, and forms required by the insurer.

(c) If the insurer rejects the claim, the notice required by Subsection (a) or (b) must state the reasons for the rejection.

(d) If the insurer is unable to accept or reject the claim within the period specified by Subsection (a) or (b), the insurer, within that same period, shall notify the claimant of the reasons that the insurer needs additional time. The insurer shall accept or reject the claim not later than the 45th day after the date the insurer notifies a claimant under this subsection.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.057. PAYMENT OF CLAIM:

(a) Except as otherwise provided by this section, if an insurer notifies a claimant under Section 542.056 that the insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the date notice is made.

(b) If payment of the claim or part of the claim is conditioned on the performance of an act by the claimant, the insurer shall pay the claim not later than the fifth business day after the date the act is performed.

(c) If the insurer is an eligible surplus lines insurer, the insurer shall pay the claim not later than the 20th business day after the notice or the date the act is performed, as applicable.

Added by Acts 2003, 78th Lg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.058. DELAY IN PAYMENT OF CLAIM:

(a) Except as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes, or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060.

(b) Subsection (a) does not apply in a case in which it is found as a result of arbitration or litigation that a claim received by an insurer is invalid and should not be paid by the insurer.

(c) A life insurer that receives notice of an adverse, bona fide claim to all or part of the proceeds of the policy before the applicable payment deadline under Subsection (a) shall pay the claim or properly file an interpleader action and tender the benefits into the registry of the court not later than the 90th day after the date the insurer receives all items, statements, and forms reasonably requested and required under Section 542.055. A life insurer that delays payment of the claim or the filing of an interpleader and tender of policy proceeds for more than 90 days shall pay damages and other items as provided by Section 542.060 until the claim is paid or an interpleader is properly filed.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2 eff. April 1, 2005. Amended by: Acts 2009, 81st Leg., R.S., Ch. 833, Sec. 1, eff. June 19, 2009.

Sec. 542.059 EXTENSION OF DEADLINES:

(a) A court may grant a request by a guaranty association for an extension of

the periods under this subchapter on a showing of good cause and after reasonable notice to policyholders.

(b) In the event of a weather-related catastrophe or major natural disaster, as defined by the commissioner, the claim-handling deadlines imposed under this subchapter are extended for an additional 15 days.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.060. LIABILITY FOR VIOLATION OF SUBCHAPTER:

(a) If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.

(b) If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case.

Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

Sec. 542.061. REMEDIES NOT EXCLUSIVE: The remedies provided by this subchapter are in addition to any other remedy or procedure provided by law or at common law. Added by Acts 2003, 78th Leg., ch. 1274, Sec. 2, eff. April 1, 2005.

DETECTING AND INVESTIGATING FRAUDULENT CLAIMS

The following are factors which should be considered in evaluating whether a loss is suspicious and whether further investigation including taking an EUO is warranted It is not intended to be exhaustive, but suggestive of some "red flags" that might surface when reviewing a suspicious claim:

1. Did the loss occur shortly after the inception of the policy or shortly before the policy was set to expire?

2. Is the insured experiencing financial difficulties, personal or business?

3. Did the insured increase his policy limits shortly before the loss?

4. Has the insured property been posted for sale for an extended period of time without success?

5. Has the insured property been posted for foreclosure for the insured's failure to properly pay the mortgage?

6. Interview the agent to determine if the insured contacted the agent shortly before the loss to discuss loss circumstances or verify coverage.

7. Is the insured difficult to contact directly?

8. Look for inconsistent statements from the insured regarding facts of the loss, his whereabouts, vague and general representations concerning other matters;

9. Interview the police officers and/or fire department personnel to determine if the insured has given them inconsistent information.

10. The lack of any forceful entry into a dwelling which has incurred a loss.

11. Aggressive or erratic behavior on the part of the insured pushing for a quick settlement.

12. Information coming from anonymous sources;

13. Prior claims history;

14. An insured is too willing to settle the loss for considerable compromise;

15. The insured is reluctant to give a recorded statement or use the mail to send in their documents (i.e., hand delivery)

16. Receipts and other documents appear to be altered;

17. Look to see if the loss occurred at night in remote areas.

18. In fire cases, look for suspicious burning patterns, multiple start locations;

19. Look for the location of significant major appliances and other items or the lack thereof;

20. Photographs are extremely helpful on initial visit to a fire scene.

21. Look for over insured property;

22. Look for documents which would normally be lost in a fire but somehow managed to survive;

23. Look for personal family photos and other significant items that might be missing.

24. Does the insured lack documentation on personal property; did he pay cash for everything or is a everything a gift from close family friends or strangers who cannot be contacted;

25. Compare the amount of items claimed in comparison with the insured's financial condition;

26. Has the insured quickly discarded damaged items prior to allowing the adjuster an opportunity to review them?

27. Compare property and contents lists with previous and prior claims;

28. Incendiary cause of fire, presence of flammable liquids or containers in and around the structure;

29. Property and structure in very poor shape or in need of repair;

Formalities of the EUO

Some cases suggest that the failure to sign, as opposed to non-appearance, will not amount to a material breach if all the purposes of obtaining the EUO are otherwise served. *Century Ins. Co. v. Hogan,* 135 S.W.2d 224, 228 (Tex. Civ. App.—Austin 1939). However, more recent case law suggests to the contrary. The EUO is not completed until it is signed and returned to the carrier. Failure to sign and return an EUO can be a breach of the contract and therefore bar recovery. *See Perrotta v. Farmers Ins. Exchange,* 47 S.W.3d 569 (Tex. App. — Houston [1st Dist.], 2001) (holding breach of the policy requirement to sign and return EUO was a reasonable basis to deny claim).

A. Insureds Right to Counsel

An insured has a right to counsel at the EUO. *Humphrey v. National Fire Insurance Co.* 231 S.W. 750, 755 (Tex. Comm'n App. 1921, judgm't adopted). A proof of loss is not a substitute for an EUO. *Provident Fire Ins. Co. vs. Asky,* 162 S.W.2d 684, 685 (Tex. 1942). Likewise a recorded statement is not a replacement for an EUO. *See State Farm General Ins. Co. v. Lawlis,* 773 S.W.2d 948, 949 (Tex. App.—Beaumont 1989, orig. proceeding); *Watson vs. National Surety Corp.,* 468 N.W.2d 448 (Ia. 1991); *see Ramsey vs. Lucky Stores, Inc.,* 853 S.W.2d 623 (Tex. App.—Houston [1st Dist.] 1993, no writ).

B. Failure to Provide Information

The failure to answer a particular question will not automatically amount to a material breach of the contract and thus result in a finding of non-cooperation. This is usually a fact issue for the jury to determine. *Norris v. Fire Ins. Exchange,* No. 09-97-034 CV, 1998 Tex. App. LEXIS 7229 (Tex. App.—Beaumont 1998, no pet.).

C. Waiver

The failure to sign and return the EUO can be waived if the carrier fails to request it.. *Perrotta v. Farmers Ins. Exchange,* 47 S.W.3d 569, 574 (Tex. App.—Houston [1st Dist.] 2001). It is helpful for the carrier to make clear written requests for compliance with the policy requirements regarding signature and return of the EUO. *Id* This breach can also be avoided with proof that the transcription was defective or incomplete. *Id.* Also, in addition to the quality of the transcription, the conditions under which it was taken, i.e. time of day, manner of questioning, can be a factor as to whether the insured may rightfully withhold signature. *Century Ins. Co. v. Hogan,* 135 S.W.2d 224, 228 (Tex. Civ. App.—Austin 1939).

Recently, in certain circumstances, courts have found that the carrier waived its right to an EUO when it had already investigated and paid the claim before demanding the examination. In *In re Cypress Texas Lloyds,* NO. 01-11-00714-CV, 2011 Tex. App. LEXIS 6598 (Tex. App.—Corpus Christi Dec. 15, 2011, no pet.), the

court held that the Insurer was not entitled to abatement of claimant's action to allow it to conduct an EUO, where, at time of filing of claimant's action, her claim had been investigated and paid, and request for examination was not made until after litigation had been filed. The court reasoned that the duties of parties under insurance contracts, including claimant's obligation to submit to an EUO, did not continue after disposition of the claim, and the insurer had a sufficient remedy in form of taking of deposition pursuant to rules of civil procedure. *See also PJC Brothers, LLC v. S & S Claims Serv., Inc.,* 267 F.R.D. 199, 201-02 (S.D. Tex. 2010) (denying a motion to abate based on the failure of an insured to submit to an EUO where the insurer requested the examination after the inception of suit). The court also noted that permitting an EUO and an abatement after the claim was paid and the litigation filed would "frustrate an objective of our legal system to resolve lawsuits with 'great expedition and dispatch and at the least expense' to the litigants." *In re Cypress* 2011 Tex. App. LEXIS 6598 at *14; *see* Tex. R. Civ. P. 1; *Hen;y Schein v. Stromboe,* 102 S.W.3d 675, 693 (Tex. 2002).

Effect of the Anti-Technicality Statute

The insured's statements in the EUO will not support denial based on misrepresentation unless it is shown that the statements were made fraudulently, were material to the issue of liability, and caused the insurers to waive or lose a valid defense to the policy. *United States Fire Ins. Co. v. Skatell,* 596 S.W.2d 166, 169 (Tex. App.—Texarkana 1980, writ ref'd n.r.e.) (holding Texas Anti-Technicality Statute, Tex. Ins. Code Ann., art. 705.003, applied to statements made in EUO's). Constructive fraud is insufficient to establish denial under the Anti-Technicality Statute.

False swearing in an EUO may or may not void the policy. *Vernon vs. Aetna Ins. Co.,* 189 F. Supp. 233 (S.D. Tex. 1960), rev'd by 301 F.2d 86 (5th Cir. 1962), *cert. denied* 371 U.S. 819 (1962). *Tex. Ins. Code Ann.,* art. 21.19 (false swearing and misrepresentations) only applies to proofs of loss and death claims according to the district court and Fifth Circuit opinions in *Vernon. Id.* at 235. In contracts, EUOs taken pre-suit and pre-claim denial may result in forfeiture. *U.S. Fire Ins. Co. vs. Skatell,* 596 S.W.2d 166, 168 (Tex. App.—Texarkana 1980, writ ref'd n.r.e.). If the requirements of

Article 705.003 are not applicable, false swearing in an EUO may void the policy.

Engaging an Attorney for the Carrier

The lawyer hired to perform the EUO should be more than a mere "investigator," otherwise the attorney files regarding the EUO may be discoverable. *In re Texas Farmers Ins. Exchange Co.,* 990 S.W.2d 337 (Tex. App.—Texarkana 1999, writ denied). However, recent cases have made it a point to protect as much of the lawyer's file as possible. Texas courts have held that when the lawyer is hired in anticipation of litigation before the Exam is taken, the attorney client and work product privilege will protect the lawyers file as well as all communications with the insurer and the insurer's agents. *See In re Certain Underwriters at Lloyd's London,* 294 S.W.3d 891 (Tex. App.—Beaumont 2009, no pet.) (holding investigator's notes of conversations with attorney and carrier which disclosed thought processes and communications were protected by both the attorney client and work product privileges); *In re Baptist Hospitals of Southeast Texas,* 172 S.W3d 136, 142-43 (Tex. App.—Beaumont 2005, no pet.) (indicating that an attorney of record may be treated differently from a lawyer hired as an investigator); and *Harlandale Independent School Dist. v. Cornyn,* 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (noting where an attorney is asked to conduct the investigation and use legal training to recommend a course of action, the attorney client privilege may apply). The lawyer's assessment of the witness as well as his analysis of coverage in light of the testimony during the EUO are protected by both work product and attorney client privileges.

Possible Waiver by Requesting

The request for an EUO, can amount to a waiver of previous breach of condition that would amount to a forfeiture. Simple communication that no waiver is intended avoids this issue. In fact, other jurisdictions have held that a reservation of rights or a non-waiver agreement will prevent waiver through demand for an EUO. Leitner & Simpson, Law & Practice of Insurance Coverage, sec. 3.7 (2002).

Objections by the Insured

There are few if any objections that can be raised in an EUO. With respect to

objections, some jurisdictions hold that even the Fifth Amendment privilege against self-incrimination cannot be used as a basis for avoiding questions. Windt, Insurance Claims & Disputes, sec. 3.4 (Oct. 2002). I do not agree and I don't think that would be the case in Texas.

Additionally, nothing prevents a carrier from recording the EUO in any manner necessary for transcription. In other words, a carrier may record the EUO by video as well as using a court reporter.

Significant Texas Cases

A. *Humphrey vs. National Fire Insurance Co.*

The case most frequently cited case in almost all EUO opinions is *Humphrey v. National Fire Insurance Co.* 231 S.W. 750 (Tex. Comm'n App. 1921, judgm't adopted). The facts in *Humphrey* are straightforward. Julia Humphrey, insured under a fire insurance policy by National Fire Insurance Company, suffered damage to her personal property in a rented home in Galveston. *Id.* at 751. She was asked to submit to an Examination Under Oath which she refused. Her claim was denied and she filed suit against her carrier and the trial court rendered judgment in favor of Humphrey. *Id.* The court of appeals reversed, finding that Humphrey had "knowingly refused" to submit to an EUO as requested. *Id.*

In the Commission of Appeals following a writ of error granted by the Supreme Court, Humphrey contended that the EUO was immaterial and was unenforceable unless the failure to give the EUO caused the actual destruction of the property damaged. *Id.* The court rejected Humphrey's argument, finding the EUO provision material; "the provision in question is a material one in such contracts, and that if the same were breached, the insurer *would be deprived of a valuable right for which it had contracted."* *Id.* at 752 (emphasis added).

However, the penalty for failure to satisfy the EUO condition (breach) is abatement, not forfeiture, according to the *Humphrey's* court. *Id.* Thus, the insurer must

plead abatement rather than defenses in bar: "that such refusal should be pleaded in abatement and *separately from defenses in bar of recovery* in all events at any time." *Id.* (citing *Aachen & Munich Fire Ins. Co. vs. Arabian Toilet Goods Co.,* 10 Ala. App. 395, 64 So. 635 (1949)) (emphasis added). The *Humphrey's* court went on to cite several cases from other jurisdictions embracing abatement rather bar. *Id.* at 753.

The court stated the rule that abatement must be done in "due order," that is before the merits are determined. *Id.* Accordingly, the court found no abatement was requested, only the refused EUO defense alleged in a subsequent answer. *Id.* Therefore, abatement was waived and so was reliance on the EUO provision. *Id.* at 753-754. The basis for this holding was that the Insurer could wait until limitations had passed and then demand an EUO conceivably causing a dismissal of Plaintiff's claim and ultimate loss due to a statute of limitations defense.

Furthermore, the court held that an EUO must be fixed at a reasonable time and place and the burden to prove same, including the knowing refusal to submit to the EUO, is on the insurer. The court in *Humphrey* found the notice for the EUO unreasonable, demanding same only a few days after the fire before Humphrey could retain counsel. *Id.* The adjuster gave notice to Ms. Humphrey on Sunday at 4:00 p.m. for an EUO that would occur on Monday at 2:30 p.m. *Id.* The court found such notice, at least implicitly, quite unreasonable, as did the jury. *Id.*

The court further held that such notice was unreasonable as Ms. Humphrey had a right to counsel who was entitled to attend the EUO. *Id.* at 755. The court specifically rejected the notion of a private examination and quoted from a Missouri appellate court: "When insurance companies proceed to take these examinations, it is *tantamount to a declaration of intention to contest the claim*". *Id.* (citing *Thomas vs. Burlington Ins. Co.*, 47 Mo. App. 169, 1891 Mo. App. LEXIS 441 (1891) (emphasis added). The court viewed the insurer's EUO demand as an implicit attempt to "take an undue advantage of the Plaintiff—to manufacture a mere technical defense," which "cannot be allowed to succeed." *Id.*

Finally, the court ruled that even if the time set for the EUO had been reasonable, Ms. Humphrey still could have refused if she later tendered herself to the insurer. *Id.* at 755. While Ms. Humphrey initially refused the EUO, she subsequently submitted herself to exam by the State Fire Marshall within several days after the fire. *Id.* This was after the insurer declined her offer for an EUO. *Id.*

In concluding the review of Ms. Humphrey's case, the court stated: "We find it difficult to escape the conclusion that the insurance company was more desirous of preserving the defense than of ascertaining the information it alleged it desired." *Id.*

The *Humphrey* case is the first Texas case to set out a number of guiding principles to be used regarding EUOs. The significance of this nearly eight-five (85) year old case cannot be underestimated.

B. *Provident Fire Ins. Co. vs. Ashy*

Another Texas case that is frequently cited in the EUO context is *Ashy*. *Provident Fire Ins. Co. vs. Ashy*, 162 S.W.2d 684 (Tex. 1942). The facts in Ashy are straightforward. Ashy, a minor, was insured under a Texas standard fire policy. *Id.* Ashy's business sustained a fire loss and a store safe saved the business's record of the store inventory and the daily sales until the date of the fire. *Id.* At 685. However, the records of purchases were destroyed. *Id.* Ashy gave the insurer's adjuster what he had and told him that he could secure invoices of purchases made. *Id.*

The policy required a proof of loss to be filed within ninety-one (91) days of the date of loss. *Id.* at 684. However, no formal proof of loss was prepared by Ashy, although an extensive interview on the subject of the loss was given to the adjuster. *Id.* Ashy also provided an affidavit on the matter and Ashy's father submitted to a sworn examination by the insurer's attorney. The insurer did not advise Ashy of anything else he needed to do to submit his claim. *Id.* The parties did execute a non-waiver agreement *Id.* at 687.

The jury found in favor of Ashy, finding that he timely submitted a sworn proof of loss and that the insurer led Ashy to believe he had done all that was necessary to comply with the proof of loss requirement. *Id.* at 684. The court of appeals affirmed. The Texas Commission of Appeals, however, disagreed, holding that an EUO and/or next level interview and/or submission of an affidavit and/or documentation were not a substitute(s) for sworn proof of loss. The two (2) provisions, proof of loss and EUO, "would be meaningless repetition of words" if one was a substitute for the other. *Id.* at 686. The court concluded that the insurer had no duty to advise Ashy of the need for a proof of loss. Notably, this is not the law today because of the Prompt Payment of Claims Act.

The lesson from Ashy is that an EUO will not satisfy the proof of loss requirement. An EUO is used in part to test the proof of loss; therefore, if the insured fails to provide same, the EUO is compromised. As a result, the submission to an EUO does not substantially comply with a requirement for a proof of loss.

This case represents a harsh result which likely would not be decided the same way today due to the Prompt Payment of Claims Act which requires that the carrier request of the insured what it needs to adjust the claim.

C. *State Farm General Ins. Co. v. Lawlis*

The landmark case of *State Farm vs. Lawlis* is frequently cited for more than just the issue of EUOS. *See State Farm General Ins. Co. v. Lawlis,* 773 S.W.2d 948 (Tex. App.—Beaumont 1989, orig. proceeding). In *Lawlis*, the Caldwells, husband and wife, sued State Farm for a fire loss sustained in their home, alleging breach of contract and violations of bad faith insurance practices. *Id.* at 948-949. State Farm timely sought abatement for a failure to satisfy a condition precedent, submission to an EUO. *Id.* at 949. The Caldwells responded by arguing that they had substantially complied with the EUO provision because Ms. Caldwell had submitted herself to a four (4) hour recorded interview with State Farm's adjuster. *Id.* The interview however was "neither sworn nor subscribed." *Id.*

The Beaumont Court of Appeals citing *Humphrey* held that the proper remedy to enforce a condition precedent is abatement. *Id.* Thus, because there was no evidence that the EUO condition was waived, the court granted mandamus relief to State Farm and ordered abatement until the EUO requirement was satisfied. Implicit in the court's short per curiam opinion was the determination that the four (4) hour recorded interview was not enough.

Lawlis stands for two (2) significant but distinct rules: (1) abatement must be sought to enforce a condition precedent such as an EUO; and (2) even an extensive interview of the insured is not substantial compliance of the EUO condition.

D. *Aetna Casualty & Sur. Co. v. Garza*

While *Garza* was not actually reviewed by the Texas Supreme Court, the San Antonio Court of Appeals wrote an extensive opinion upholding a bad faith verdict against Aetna. *Aetna Casualty & Sur. Co. v. Garza*, 906 S.W. 2d 543 (Tex. App.—San Antonio 1995, writ dism'd). In *Garza*, the insureds' home was destroyed by fire due to arson. *Id.* at 547. Mr. Garza was separated from Ms. Garza at the time of the fire and Mr. Garza eventually went to prison for drug related offenses. *Id.* at 545. Ms. Garza, who was not home at the time of the fire, made a claim with Aetna the next day following the fire. *Id.* at 546. Aetna commenced an investigation and very quickly focused on the insureds as accomplices in the fire. *Id.* at 547-548. The investigation took nearly two (2) years and included numerous statements from the Garzas. *Id.* at 546. At some point, Aetna sought the EUO of Ms. Garza. *Id.* at 547. Ms. Garza hired counsel and immediately requested a copy of her policy from Aetna since the fire destroyed her copy. *Id.* It took Aetna fourteen (14) months to get her a copy of her policy and this was after numerous requests for the policy; Ms. Garza hiring new counsel and receiving two reservation of rights letters. She also was subjected to various cancellations of her EUO, including at least one appearance of Ms. Garza and her attorney where Aetna and its counsel failed to appear, Id. at 548.

Eleven (11) months after the fire, Ms. Garza filed suit seeking declaratory relief.

Id. Subsequently, the suit was amended to include various bad faith claims. *Id.* Aetna sought abatement even though, at that time it still had not provided Ms. Garza a copy of her policy. Aetna admitted its failure and its plea for abatement was denied until such time it provided Garza's policy to her. *Id.* After providing the policy to Ms. Garza, both Mr. and Mrs. Garza's EUOs were taken. *Id.* Nearly two (2) years after the fire, Aetna tendered approximately $95,000.00 to Ms. Garza on behalf of her $177,600.00 claim. *Id.*

A jury, found in favor of Ms. Garza on all of her claims, awarding her $300,000.00 for the fire loss, $150,000.00 for breach of the duty of good faith and fair dealing, $150,000.00 for knowing conduct, and punitive damages for $1,000,000.00 against Aetna and its adjuster. *Id.* at 549. The judgment exceeded 1.5 million dollars ($1,500,000.00) and also included attorney's fees. *Id.*

Although the San Antonio Court of Appeals reversed some of Ms. Garza's damages, the court was harsh in its analysis of Aetna and its representatives' conduct. Aetna, predictably blamed the delay and resolution of Ms. Garza's claim on her refusal to submit to an EUO. The court wrote:

> Aetna's inability to obtain the examinations under oath was a situation created by Aetna itself when it failed to honor Garza's request for a copy of the policy. Aetna could have obtained the examinations under oath long before it did by providing Garza with a copy of her policy. Aetna's witnesses consistently acknowledged that Garza had a right to a copy of her policy and that the policy was the best source of information regarding her obligations. Aetna failed to provide Garza with a copy of her policy until required to do so by the court, despite repeated requests for more than fourteen months.

Id. at 550.

Aetna attempted to excuse its conduct by telling the court that the issue was whether payment was delayed without a reasonable basis not whether furnishing the policy was delayed "without a reasonable basis." *Id.* The court agreed with Aetna but pointed out that it could not excuse its delay when it refused a reasonable and proper request by the insured, i.e. furnishing a copy of her policy before an EUO was taken. *Id.*

Stated simply, Aetna could not escape liability by refusing to provide an item the insured needed in order to satisfy the condition precedent.

Furthermore, the court found Aetna's conduct was unconscionable under the DTPA when it deprived Ms. Garza of the "best source of information regarding the rights and obligations under an insurance policy itself." *Id.* at 553. Aetna's own witnesses conceded that Ms. Garza would be at a disadvantage if she had no copy of the policy from which to refer. *Id.*

Finally, the court repeatedly pointed out that Aetna was focusing its investigation only on the Garzas and any investigation was outcome oriented. *Id.* at 551. The court appeared to suggest at least implicitly that the requirement of an EUO was a mere pretext and would not be allowed as a basis to justify its delay or refusal to pay a claim. *Id.* at 554.

Garza stands for some very significant propositions regarding EUOs. First, reasonable requests for information by the insured relating to EUOs cannot be ignored in order to set up an abatement, excuse extra-contractual conduct, or justify forfeiture of a claim. Second, when EUOs are used as a pretext, that is a technical reason not to pay a claim especially where the insurer has already made up its mind, the reliance on same by an insurer will be ignored. Third, Aetna's conduct including: the failure to provide the insurance policy in a timely manner, the failure to appear for the EUO it demanded, the extensive interviews and information provided by Ms. Garza pre-EUO, and the obviously pretextual investigation, this case demonstrated the elements of waiver by Aetna and substantial compliance by the Garzas.

E. In Re Texas Farmers Ins. Exchange

One case frequently overlooked dealing with EUOs and discovery is *In Re Texas Farmers Ins. Exchange*. 990 S.W.2d 337 (Tex. App.—Texarkana 1999, writ denied). The facts are uncomplicated. On May 13, 1996, the Chappells' home was damaged by fire and they made a claim on their Farmers policy. *Id.* at 338. Following the receipt of a

May 31, 1996 report from its own fire investigator that the fire was not accidental, Farmers hired attorney Greg Scott to conduct an EUO of the Chappells. *Id.* Scott conducted the EUOs about one month after being hired and the claim was denied on September 17, 1996 about forty-five (45) days after the EUOs were taken. *Id.* The denial was based on Farmers belief that the Chappels had set the fire and/or had knowledge of same. *Id.* The denial letter also asserted that the Chappells made material misrepresentations in presenting their claim. *Id.*

Predictably, the Chappells sued Farmers on their claim and noticed the deposition of Scott, including a duces tecum seeking the claims adjuster's file which included reports and documents in Scott's possession relating to their claims. *Id.* at 340. Farmers filed a motion to quash, asserting various privileges including attorney-client, work product, party communications, and witness statements. *Id.* In essence, Farmers claimed these materials were done in anticipation of litigation. *Id.*

Following a hearing, the trial court overruled Farmers' objections, holding that Farmers had not presented sufficient evidence to sustain its privilege claims and that Scott was merely conducting a routine investigation. *Id.* More significantly, the trial court held that Scott was acting as an investigator, not an attorney, and that Farmers had no reasonable basis to anticipate litigation prior to suit being filed. *Id.*

Farmers sought mandamus relief, which was denied except for the date of anticipation. *Id.* at 340. The Texarkana Court of Appeals took note of Scott's testimony at the hearing that an EUO was "a presuit investigation tool which has been used by insurers in Texas for about 70 years." *Id.* at 341. The court ruled that Scott, in taking the EUO, was conducting a routine investigation and he was attempting to shield his investigation merely because he was an attorney. To allow this, would permit an insurer to hire lawyers to do investigations just to prevent disclosure. *Id.*

With regard to the date for anticipation of litigation, the appellate court noted that Scott testified that he was not told that Farmers anticipated litigation on the date it received the investigator's report or prior to the EUO. *Id.* at 342. Rather, the Court noted

that Farmers "did not claim that it had already determined that it would likely deny the claim immediately after receiving the investigator's report". *Id.*

The Supreme Court denied relief over the dissents of Justices Hecht and Owens. *In Re Texas Farmers Ins. Exchange*, 12 S.W.3d 807 (Tex. 2000).

This case unfortunately provides some bullet points for plaintiff's counsel in pursuing a claim on behalf of an insured. EUOs are may appear to be part of an insured's routine investigation and thus not protected from discovery. Should an insurer assert otherwise, an argument can be made that the EUO was pretextual, i.e. the insurer had already made up its mind. An investigator for an EUO cannot be shielded from discovery merely because he is a lawyer. I think some additional arguments could be made on behalf of the carrier and its counsel but at least in this instance the Supreme Court refused to grant Farmers relief.

F. *Perrotta v. Farmers Ins. Exch.*

A more recent case that seems to muddy the EUO waters is *Perrotta v. Farms Ins. Exchange*. 47 S.W.3d 569 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Raymond Perrotta was insured with Farmers under a homeowner's policy. *Id.* at 571. In 1996, Perrotta made a theft claim with Farmers after discovering several boxes of personal property were missing. *Id.* Perrotta reported the loss to the police and made a claim with Farmers. *Id.* Mike Stevens, a Farmers adjuster, met with Perrotta where both men constructed a loss worksheet listing what was stolen and Stevens took a recorded statement from Perrotta. Stevens also received a proof of loss from Perrotta and Farmers asked Perrotta to sign an authorization so Farmers could obtain financial information on Perrotta. *Id.*

Farmers rejected the proof of loss because there was no dollar amount of loss claimed and no notary seal. *Id.* Farmers sent a new proof of loss and new authorization, which it never received back. *Id.* Farmers requested an EUO, including a document request. *Id.* Perrotta appeared, answered questions, and produced nine (9) photographs

depicting some of the missing items. *Id.* No receipts or other documents substantiating damages were provided and Perrotta failed to sign and return the EUO to Farms. *Id.*

Farmers sent Perrotta additional letters seeking further information and seeking the return of a signed EUO. *Id.* at 572. Farmers eventually denied Perrotta's claim because no theft occurred or Perrotta caused same and because of fraud and false swearing in the proof of loss and EUO. *Id.* The claim was also denied because of lack of cooperation, including failing to provide Farmers with certain information it had sought following the EUO. *Id.*

Perrotta filed suit against Farmers and some of its representatives for the denial of his claim, including extra-contractual and statutory claims. *Id.* Farmers generally denied Perrotta's claim and asserted that Perrotta failed to comply with certain policy conditions and violated the policy's concealment provision. *Id.* While Farmers sought summary judgment on all of Perrotta's claims, only the basis for the contractual claims are relevant: (1) Prerotta committed fraud in applying for the insurance; (2) Perrotta breached the policy by refusing to comply with its terms and conditions; and (3) Perrotta violated the concealment provision. *Id.*

Perrotta's response included a motion for continuance seeking additional discovery to respond to Farmers' motion for summary judgment. Perrotta also responded by claiming there were no misrepresentation, that he had fully cooperated and satisfied all conditions to the policy, and there was no fraud or intent to deceive. *Id.* The trial court denied the motion for continuance and granted Farmers' summary judgment motion. *Id.*

On appeal, the Houston Court of Appeals discussed the EUO requirement, including the obligation to sign and swear to the transcript. *Id.* at 573. Perrotta contended that he had substantially complied with the EUO provision, citing *Century Ins. Co. v. Hogan*, 135 S.W.2d 224 (Tex. Civ. App.—Austin 1939, no writ). *Hogan*, however, was distinguishable because no notary was available and the transcript was inaccurate. *Id.* Moreover, Perrotta never offered an excuse for failing to sign and swear to the EUO transcript given the adjuster's summary judgment affidavit that Perrotta did not

comply. *Id.* at 574.

The court viewed Perrotta's conduct as a breach of contract. *Id.* The court did mention *Lawlis* but never discussed *Humphrey* and *Lawlis* mandating that abatement is the remedy rather than forfeiture or breach. Apparently, the argument was not made by Perrotta. Curiously, the appellate court based its affirmance of summary judgment on Perrotta's contract claims on its EUO/breach of contract analysis even though Farmers denied the claim for false swearing in the EUO. Given the facts this case may have limited application and I wouldn't recommend that it is the law as I think "substantial compliance" with the EUO provision is what is required but this court did require strict conformance to the policy requirements.

G. *Lidawi vs. Progressive County Mutual Ins. Co.*

One of the most recent cases on EUOs is *Lidawi*, and it appears to answer at least one unanswered question in Texas regarding EUOs. *Lidawi vs. Progressive County Mutual Ins. Co.*, 112 S.W.3d 725 (Tex. App. –Houston [14th Dist.] 2003, no pet.). The Houston Court of Appeals (14th Dist.) held that an insurer could compel separate EUOs from a husband and wife pursuant to the EUO provision. *Id.* at 727.

In *Lidawi*, Progressive sought separate EUOs of the two insureds, husband and wife, following a uninsured claim. *Id.* When both parties appeared for the EUOs, Progressive demanded they be conducted separately. *Id.* The insureds refused and no EUO was taken. *Id.* Progressive later demanded separate EUOs again but the Lidawis refused. *Id.* Progressive denied the Lidawis' claim for noncooperation. *Id.*

The Lidawis sued Progressive for declaratory relief including breach of contract. *Id.* Progressive counterclaimed alleging separate EUOs were consistent with the contract's language and that the failure to comply amounted to a breach of the cooperation clause. *Id.* Both parties filed for summary judgment and the trial court ruled in favor of Progressive finding the request for separate EUOs was proper, the Lidawis failed to comply with such condition, and the Lidawis suit was dismissed with costs and

attorney fees taxed against the Lidawis. *Id.* at 729.

On appeal, the court of appeals affirmed the trial court in part. The appellate court proceeded to hold that when a contract is silent on a matter, a reasonable interpretation will be made. *Id.* at 731. Furthermore, the court held that "Texas courts will also supply missing terms when necessary to effectuate the purposes of the parties under the agreement." *Id.* In ruling in favor of Progressive on the issue of separate EUOs, the court of appeals relied heavily on *Shelter Ins. Co. v. Spence*, 656 S.W.2d 36, 38 (Tenn. Ct. App. 1983) for the notion that it was more likely that accurate factual information could be obtained from separate EUOs. *Id.*

The court of appeals seemed to fail to apply the long standing rule that ambiguities in an insurance policy shall be construed in favor of the insured. Given that most Texas policies are silent on the issue of separate EUOs, it is hard to understand how appellate courts will ignore silence, obvious ambiguity, and then supply a missing term. Moreover, the court of appeals appeared to expressly reject this principle when it held that Texas public policy was not similar to Alabama's which also embraced the ambiguity doctrine. This was despite the fact that the Court cited and relied heavily on *Nat'l Union Fire Ins. Co. v. CBI Industries, Inc.*, 907 S.W.2d 517 (Tex. 1995) which stands for the very rule the court rejected. *Lidawi*, 112 S.W.3d at 520.

The court in permitting separate EUOs failed to take into account the language approved of by the Texas Supreme Court in *Humphrey*: "The liability of the Defendant having become fixed by the happening of the event, upon which the contract was to mature, conditions which prescribe methods and formalities for ascertaining the extent of it or for adjusting it, are not to be subjected to any narrow or technical construction but construed liberally in favor of the insured." *Humphrey*, 231 S.W.2d at 754 (citing *Porter v. Ins. Co.*, 164 N.Y. 504, 509-510, 58 N.E. 641 (1900)).

The *Lidawi* Court did reverse the summary judgment granted in favor of Progressive, finding the remedy for Progressive was mandamus and the issue at hand was a matter of first impression. 112 S.W.3d at 735.

Bluntly stated, *Lidawi* is questionably decided. Note that *Lidawi* was not reviewed by the Texas Supreme Court and no motion for rehearing was filed in the court of appeals. A Lexis search indicates that this case has not been subsequently cited for the proposition of separate EUOs.

In addition, there is no discussion in *Lidawi* of *Humphrey's* language regarding construction of a term and/or ambiguity in an insurance policy. The Houston Court of Appeals in contradiction of longstanding rules on interpreting insurance policies simply adopts the insurer's interpretation because it is good policy and will prevent collusion. Lastly, the *Lidawi* Court notes that the Texas Rules of Civil Procedure regarding spouses does not require sequestration in lawsuits but there is "no principled reason why a spousal exemption should extend to the realm of investigation, and we discern none." *Id.* at 732, n.3.

H. *In re Cypress Texas Lloyds*,

The most recent case on EUOs is *In re Cypress Texas Lloyds.* NO. 01-11-00714-CV, 2011 Tex. App. LEXIS 6598 (Tex. App.—Corpus Christi Dec. 15, 2011, no pet.). In *In re Cypress Texas Lloyds*, the insurer did not request an EUO prior to making a payment for property damage. Contending that the payment was insufficient to make the necessary repairs, the insured filed suit and sent the insurer additional written notice of her claims the same day. The Insurer filed its answer to the lawsuit and, one month later, filed a verified motion to abate the suit on grounds that the insured had failed to send notice of the lawsuit or submit to an EUO.

On appeal, the court held that the Insurer was not entitled to abatement of insured's action to allow it to conduct an EUO, where, at time of filing of insured's action, her claim had been investigated and paid, and request for examination was not made until after litigation had been filed. The court reasoned that the duties of parties under insurance contracts, including claimant's obligation to submit to an EUO, did not continue after disposition of the claim, and insurer had sufficient remedy in form of taking of deposition pursuant to rules of civil procedure. *See also PJC Brothers, LLC v. S & S Claims Serv., Inc.,* 267 F.R.D. 199, 201-02 (S.D. Tex. 2010) (denying a motion to

abate based on the failure of an insured to submit to an EUO where the insurer requested the examination after the inception of suit). The court also noted that permitting an EUO and an abatement after the claim was paid and the litigation filed would "frustrate an objective of our legal system to resolve lawsuits with 'great expedition and dispatch and at the least expense' to the litigants." *In re Cypress,* 2011 Tex. App. LEXIS 6598 at *14; *see* Tex. R. Civ. P. 1; *Hen;y Schein v. Stromboe,* 102 S.W.3d 675, 693 (Tex. 2002).